

**IN THE SUPREME COURT
STATE OF MISSOURI**

IN RE:)
)
JAMES F. CREWS,) **# SC86212**
)
Respondent.)

RESPONDENT'S BRIEF

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STATEMENT OF FACTS

Background and Disciplinary History

Mr. Crews was admitted to Missouri's bar in 1964. **Inf. App. A-29.** He conducts a general trial practice out of his office in Tipton. **(T. 63).**

On January 22, 2002, the Court publicly reprimanded Respondent for violation of Rule 4-1.3. **Inf. App. A-52.**

Facts Underlying Disciplinary Case

On June 2, 1993, Tom Hodge was driving a vehicle in Miller County in which his wife, Betty, and her son, Richard, were passengers. **(T. 10-11).** A vehicle being driven by Jerry Daniels approached them from the opposite direction and made a left turn in front of the Hodge vehicle. **(T. 11).** As a consequence of the ensuing collision, Mrs. Hodge and Richard suffered injuries for which they were hospitalized for three days. **(T. 11).** Tom Hodge's knees were crushed in the accident. He was hospitalized for two or three weeks. Mr. Hodge, who had previously operated a pest control business, was never thereafter able to walk without the assistance of first a wheelchair, then crutches, then a cane. **(T. 11-12).** He was never able to bend down after the accident and never returned to work full time. **(T. 12-13, 45).**

The Hodge family had known Mr. Crews for years. **(T. 14-15, 93).** The Hodges contacted Mr. Crews for advice after the accident. **(T. 13).** When the Hodges first engaged Respondent they had not made settlement with their underinsured motorist coverage, so his office assisted them in this regard; the Hodges eventually received over

\$170,000 for the car accident. (T. 45); Inf. App. A-185. Mrs. Hodge admitted they received over \$100,000. (T. 13-15). However, Mrs. Hodge believed the case was worth “millions” and thought it was a way for her and Mr. Hodge to leave something for their children. (T. 38, 57-58).

Suit was to be brought against the driver of the other car, Jerry Daniels, and his employer at the time of the collision, Miller County Motors, a Ford dealership also known as Auffenberg Ford. (T. 11, 14). It was explained to the Hodges that the case would not go forward unless and until evidence could be found connecting Mr. Daniels to his job at the car dealership when the collision occurred. (T. 45, 48-49, 65). This evidence was not obtained until February 1998 (T. 47, 67); Respondent filed suit on behalf of the Hodges shortly thereafter, as admitted by Mrs. Hodge. (T. 47-48, 67). Prior to that time, Respondent hired an investigator and made some inquiries himself to attempt to connect Mr. Daniels to his employer. (T. 65-66). However, Mr. Crews would not go out and manufacture witnesses. (T. 66-67). After the investigator was unable to make the relevant connection, the Hodges knew (T. 45-47, 66) that they were to try to find a connection between Mr. Daniels and his employer, which they eventually did in February 1998. (T. 47, 67). When the Hodges were able to connect Mr. Daniels to the Ford dealership at the time of the accident, they informed Respondent, who told them they would need to get a signed statement from Mr. Daniels to that effect. (T. 47). The Hodges asked Mr. Crews to have such a statement typed up, which he did. (T. 47).

During the course of his representation of the Hodges, Respondent had numerous meetings with them, some of which were with Mr. Hodge by himself (including a

meeting shortly before the death of Mr. Hodge), and Respondent never failed to return a phone call from the Hodges. **(T. 92-93)**. Mrs. Hodge disputes this, although she testified that she and her husband called Respondent “constantly.” **(T. 18)**. Respondent and the Hodges had “a lot of active conversation.” **(T. 67)**.

Mr. Daniels’ deposition was taken on May 14, 1999. **Inf. App. A-58**. On November 24, 1999, the car dealership filed a summary judgment motion which stated that the “plaintiffs claim defendant, Jerry Daniels, negligently operated a motor vehicle and that Daniels, at the time of the accident, was acting in the course and scope of his employment as an employee of defendant, Miller County Motors”; that Miller County Motors disputed the fact that Daniels was acting in the course and scope of his employment at the time of the accident; and further admitted that Daniels had signed a statement which stated he was employed and working for the dealership at the time of the collision. **Inf. App. A-123, A-126**. The summary judgment rule in effect at the time provided that “After the response has been filed or the time for filing the response has expired, whichever is earlier, the judgment sought shall be entered forthwith if a motion for summary judgment and response thereto show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” **Resp. App. A-5**. Since Respondent believed the summary judgment motion showed on its face that a genuine issue of material fact existed, Respondent did not file a written response. **(T. 95)**. The Hodges were fully informed of any information that came into Respondent’s possession concerning the case and were informed of the motion. **Resp. App. A-11-12;(T. 72, 74)**.

During the same time period that Respondent was representing the Hodges in their case in Miller County against Auffenberg Ford for the automobile accident, Respondent was also representing the Hodges in another case in Miller County brought by Ford Motor Credit Company. **(T. 49-50, 86-87), Resp. App. A-7-9.** The Ford Motor Credit case had been set for January 11, 2000, but prior to the January hearing Respondent was able to reach agreement with counsel for Ford Motor Credit to dismiss the case. **(T. 86, 94).** The motion for summary judgment in the Auffenberg Ford case was called up for January 13, 2000 **(T. 86).** The summary judgment hearing was miscalendared by Respondent's staff **(T. 73, 84)** and Respondent confused the Auffenberg Ford case with the Ford Motor Credit case **(T. 85, 93-94);** believing that the case had already been taken care of, he failed to appear for the summary judgment argument on January 13, 2000. **(T. 85, 93-94).**

Respondent informed the Hodges of the motion for summary judgment. **(Resp. App. A-11-12; T. 72, 74).** Respondent first found out that the summary judgment had been granted from Mr. Hodge **(T. 73, 94).** Upon learning that the case had been dismissed, he quickly filed a motion to set aside the summary judgment. **(T. 94).** The Hodges were fully informed of any information that came into Respondent's possession concerning the case. **Resp. App. A-11-12.** Respondent told the Hodges he didn't think the trial court would grant the motion. **(T. 74).** Upon learning that the case had been dismissed pursuant to the summary judgment motion, he told them he had not been at the hearing on the motion because he thought it was the Ford Motor Credit case **(T. 73-74),** although Mrs. Hodge contends otherwise. **(T. 26).** Respondent told the Hodges that his

motion to set aside had been overruled, and that he would have to take it to an appeals court. **(T. 42-43).**

Mr. Hodge died of natural causes on July 6, 2000. **(T. 29-30).** By letter dated September 8, 2000, the court of appeals advised Respondent that his brief had been stricken due to failure to comply with Rule 84.04, but provided Respondent with the opportunity to file an amended brief. **Inf. App. A-161.** Respondent filed an amended brief on September 18, 2000. **Inf. App. A-162-176.** The amended brief was different than the brief filed in August in that Respondent changed some words in the Point Relied On and expanded his respondeat superior argument. **(T. 75-76).** By order dated September 28, 2000, the court of appeals dismissed the appeal due to briefing deficiencies. **Inf. App. A-177.**

Mr. Crews sent Mrs. Hodge a letter dated September 29, 2000, enclosing the court of appeals' dismissal order. Respondent told Mrs. Hodge in the letter that everything he had done had backfired, and suggested that she should get another attorney if she wished to continue pursuing the case. **Inf. App. A-178; (T. 30-31, 52).** Instead, Mrs. Hodge got an attorney to sue Respondent for malpractice. **(T. 52-53).** Her new attorney told Respondent that he would rather sue Respondent than go to the Court of Appeals and get the case straightened out. **(T. 59, 95-96).** The malpractice suit was eventually dismissed. **(T. 34-35).**

Mrs. Hodge filed a complaint with the Office of Chief Disciplinary Counsel on April 20, 2001. **Inf. App. A-179-184.** In a letter Mr. Crews directed to Mrs. Hodge about the complaint, in reference to the malpractice suit she had filed against him, he

stated that “I am sorry that you feel that you are somehow entitled to money. You had a claim and it was dismissed. I assume that it was dismissed because it was not worth pursuing. Please do not blame your other attorney’s actions on me.” **Inf. App. A-186.**

Disciplinary Case

An Information was filed against Respondent in June of 2003. It alleged certain specific acts in violation of Rules 4-1.1, 4-1.3, 4-1.4, 4-1.5(c), and 4-8.4(c). **Inf. App. A-37-39.** Respondent filed an Answer to the Information and at the same time filed another pleading, also denominated an Answer, which contained certain explanations to assist in interpreting the answers. **Resp. App. A-10-12.** Hearing was had before a Panel on March 19, 2004. The only witness who testified against Respondent at the hearing was Mrs. Hodge. **(T. 3).** It had previously been established in a Social Security hearing that Mrs. Hodge was disabled due to stress and mental and physical limitations. **Inf. App. A-185.** At the hearing Mrs. Hodge admitted that she was bitter, and did not feel that the dismissal of her malpractice suit against Respondent was enough “punishment.” **(T. 35-36).** The Panel recommended disbarment. **Inf. App. A-187-191.**

POINTS RELIED ON

I.

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT BECAUSE HE DID NOT VIOLATE MULTIPLE DUTIES TO HIS CLIENTS IN THAT HE DID NOT MISLEAD THEM, HE DID NOT FAIL TO COMMUNICATE MATERIAL INFORMATION TO THEM, HE DID NOT FAIL TO REPRESENT THEM DILIGENTLY AND HE DID NOT FAIL TO REPRESENT THEM COMPETENTLY IN VIOLATION OF RULES 4-1.1, 4-1.3, 4-1.4(a) OR 4-8.4(c), AND ANY VIOLATION OF RULE 4-1.5(c) FOR FAILURE TO PUT THEIR CONTINGENT FEE AGREEMENT IN WRITING WAS NOT AN ISSUE WITH HIS CLIENT AND DID NOT CAUSE ANY HARM OR INJURY, AND INFORMANT HAS NOT PROVEN THE CONTRARY OF ANY OF THE ABOVE BY A PREPONDERANCE OF THE EVIDENCE.

[RESPONDS TO INFORMANT’S POINT I]

ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371

(Mo. 1993)

Hanna v. Darr, 2004 Mo. App. LEXIS 1977 (Mo. App. 2004)

In re Westfall, 808 S.W.2d 829 (Mo. 1991)

In re Shelhorse, 147 S.W.3d 79 (Mo. 2004)

Rule 5.11

Rule 74.04 (1999)

ABA/BNA Lawyers' Manual on Professional Conduct

POINTS RELIED ON

II.

ASSUMING THAT THE SUPREME COURT DETERMINES THAT IT SHOULD IMPOSE SOME DEGREE OF DISCIPLINE ON RESPONDENT THE COURT SHOULD NOT IMPOSE ANY DISCIPLINE MORE SEVERE THAN A REPRIMAND AGAINST RESPONDENT BECAUSE THE RELEVANT STANDARDS, PRIOR CASES OF THIS COURT, AND THE MITIGATING FACTORS PRESENT INDICATE THAT THE MOST SEVERE DISCIPLINE WHICH COULD BE WARRANTED UNDER THE EVIDENCE IS A REPRIMAND IN THAT, AT MOST, ALL INFORMANT HAS PROVEN IS AN ACCIDENTAL, UNINTENTIONAL VIOLATION DUE TO A MISTAKE ON THE PART OF RESPONDENT.

[RESPONDS TO INFORMANT'S POINT II]

In re Staab, 719 S.W.2d 780 (Mo. 1986)

In re Hardge, 713 S.W.2d 503 (Mo. 1986)

In re Cupples, 952 S.W.2d 226 (Mo. 1997)

ABA Standards for Imposing Lawyer Sanctions

ABA/BNA Lawyers' Manual on Professional Conduct

ARGUMENT

I.

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT BECAUSE HE DID NOT VIOLATE MULTIPLE DUTIES TO HIS CLIENTS IN THAT HE DID NOT MISLEAD THEM, HE DID NOT FAIL TO COMMUNICATE MATERIAL INFORMATION TO THEM, HE DID NOT FAIL TO REPRESENT THEM DILIGENTLY AND HE DID NOT FAIL TO REPRESENT THEM COMPETENTLY IN VIOLATION OF RULES 4-1.1, 4-1.3, 4-1.4(a) OR 4-8.4(c), AND ANY VIOLATION OF RULE 4-1.5(c) FOR FAILURE TO PUT THEIR CONTINGENT FEE AGREEMENT IN WRITING WAS NOT AN ISSUE WITH HIS CLIENT AND DID NOT CAUSE ANY HARM OR INJURY, AND INFORMANT HAS NOT PROVEN THE CONTRARY OF ANY OF THE ABOVE BY A PREPONDERANCE OF THE EVIDENCE.

[RESPONDS TO INFORMANT’S POINT I]

Applicable Standard: In disciplinary proceedings, this Court reviews the evidence de novo and independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law; the decision of the disciplinary hearing panel is purely advisory. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. 2004). “Professional misconduct must be proven by a

preponderance of the evidence before discipline will be imposed.” *Id.* Informant’s brief failed to set forth the applicable standard.

In the Information filed against Respondent, Informant charged Respondent with certain specific acts in violation of Rules 4-1.1, 4-1.3, 4-1.4(a) and 4-8.4(c) (**Inf. App. A-37-39**) as required by Rule 5.11(c). **Resp. App. A-3.** However, in its brief before this Court, Informant briefed additional alleged violations not contained in the Information. This Court must only consider those charges contained in the Information. *In re Westfall*, 808 S.W.2d 829, 832 (Mo. 1991).

In addition, when reviewing the evidence against Respondent the Court should be aware that the only witness who testified against Respondent at the disciplinary hearing was the complainant Mrs. Hodge, who has admitted to being bitter and wanting Respondent to be punished (**T. 35-36**), and who thought her underlying lawsuit was worth “millions” and apparently viewed it as an estate plan for the children of Mr. and Mrs. Hodge. (**T. 38, 57-58**). It had previously been established in a Social Security hearing that Mrs. Hodge was disabled due to stress and mental and physical reasons. **Inf. App. A-185.**

Informant claims Respondent violated Rule 4-1.3 by not filing suit for four years. First, Informant’s reference to this time period as “four uncommunicative” years is simply inaccurate. Respondent and the Hodges had “a lot of active conversation.” (**T. 67**). During the course of the representation Respondent had numerous meetings with the Hodges, some of which were with Mr. Hodge by himself (including a meeting shortly before the death of Mr. Hodge), and Respondent never failed to return a phone call from

the Hodges. (T. 92-93). Even Mrs. Hodge testified that she and her husband called Respondent “constantly.” (T. 18). This is certainly not “uncommunicative;” the Hodges were fully informed.

These years were also not “inactive.” Informant admits in the statement of facts that “it was explained to the Hodges that the case would not go forward unless and until evidence could be found connecting Mr. Daniels to his job at the car dealership when the collision occurred.” (T. 45). This evidence was not obtained until February 1998 (T. 47, 67); Respondent filed suit on behalf of the Hodges shortly thereafter. (T. 47-48, 67). Prior to that time, Respondent did what he could by hiring an investigator and making some inquiries himself to attempt to connect Mr. Daniels to his employer, to no avail. (T. 65-66). After the investigator was unable to make the relevant connection, the Hodges knew (T. 45-47, 66) that they were to try to find a connection between Mr. Daniels and his employer, which they eventually did in February 1998. (T. 47, 67). It is unreasonable for Informant to claim Respondent should have filed suit without a witness or evidence to support the lawsuit.

Informant next claims that Respondent violated Rule 4-1.1 and 4-1.3 by not filing a response to his opponent’s motion for summary judgment. Respondent submits that the motion for summary judgment showed *on its face* that a genuine issue of material fact existed which should have precluded the entry of summary judgment, thereby obviating the need to file a response. The motion itself stated that the “plaintiffs claim defendant, Jerry Daniels, negligently operated a motor vehicle and that Daniels, at the time of the accident, was acting in the course and scope of his employment as an employee of

defendant, Miller County Motors”; that Miller County Motors disputed the fact that Daniels was acting in the course and scope of his employment at the time of the accident; and further admitted that Daniels had signed a statement which stated he was employed and working for the dealership at the time of the collision. **Inf. App. A-123, A-126.** The summary judgment rule in effect at the time provided that “After the response has been filed **or the time for filing the response has expired**, whichever is earlier, the judgment sought shall be entered forthwith **if a motion for summary judgment** and response thereto **show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.**” Rule 74.04(c)(3) (1999)(emphasis added). **Resp. App. A-5.** Respondent submits that this quoted portion of the Rule shows that the Rule contemplates (i) that responses will sometimes not be filed, and (ii) that the motion should not be granted unless it is shown that there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law, which does not necessarily depend upon a response being filed.

“Summary judgment is appropriate where the movant shows that he is entitled to judgment as a matter of law and no genuine issues of material fact exist. Rule 74.04(c).” *Frank v. Mathews*, 136 S.W.2d 196, 199 (Mo. App. 2004); *see also, ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371 (Mo. 1993). “To make a *prima facie* case for summary judgment under Rule 74.04, the movant must allege facts, . . . demonstrating the lack of a genuine issue as to such facts and which establish a right to judgment as a matter of law.” *Bost v. Clark*, 116 S.W.3d 667, 674 (Mo. App. 2003). “When, and only when, the movant has made the *prima facie* showing

required by Rule 74.04(c), [the Rule] places burdens on the non-movant.” *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo. 1993); *see also, Harris v. Shelter Mutual Insurance Company*, 141 S.W.3d 56, 59 (Mo. App. 2004)(“**Once the movant has established a right to judgment** as a matter of law, the non-movant must demonstrate that one or more material facts asserted by the movant as not in dispute is, in fact, genuinely disputed [citing *ITT Commercial Finance Corp.*]”(emphasis added)). Furthermore, in *Hanna v. Darr*, 2004 Mo. App. LEXIS 1977 (Mo. App. 2004), the Court of Appeals recently held that because the movant did not comply with Rule 74.04 and because the movant did not establish that he was entitled to summary judgment as a matter of law, the trial court had erred in granting summary judgment in favor of movant **even though** the non-movant did not comply with the portion of the rule governing responses in that the non-movant did not respond and admit or deny each of movant’s factual statements in numbered paragraphs that correspond to movant’s numbered paragraphs.

As can be seen from the foregoing, it was reasonable for Respondent to believe that no response to the motion for summary judgment needed to be filed. “A lawyer acts competently if he exercises reasonable professional judgment, even though his opinion on a difficult or unsettled question of law is erroneous.” ABA/BNA Lawyers’ Manual on Professional Conduct p. 31:204. Therefore, even if Respondent was wrong - although the cases cited above would indicate that he was correct – he did not violate Rule 4-1.1 by not filing a response to the motion since his judgment was reasonable. Accordingly, he

also cannot be accused of violating Rule 4-1.3 for not “diligently” doing something he was not required to do in the first place.

In their brief Informant next appears to allege that Respondent committed some Rule violation by failing to appear for argument on the summary judgment motion. However, this is one of the alleged violations briefed by Informant but not charged in the Information. **Inf. App. A-37-39.** This Court must only consider those charges contained in the Information. *In re Westfall*, 808 S.W.2d 829, 832 (Mo. 1991). At this point in their brief Informant also impugns Respondent’s honesty, and accuses him of “prevaricating” and “conjuring up” explanations for failing to appear at the motion argument; to quote Informant’s brief, Respondent “either had the case mixed up with another one in which he represented the Hodges, or his office staff miscalendared it.” Respondent submits that the summary judgment hearing was miscalendared by his staff **(T. 73, 84)** and he confused the case with another case he was handling for the Hodges. **(T. 85, 93-94).** There is nothing inconsistent with these statements.

To understand this confusion, the Court must recognize that during the same time period that Respondent was representing the Hodges in their case in Miller County against Auffenberg Ford for the automobile accident, Respondent was also representing the Hodges in another case in Miller County brought by Ford Motor Credit Company. **(T. 49-50, 86-87), Resp. App. A-7-9.** In other words, Respondent was representing the same clients, in the same county, at the same time, against an opposing party with a similar name, *i.e.*, another Ford company. The Ford Motor Credit case had been set for January 11, 2000, but prior to the January hearing Respondent was able to reach

agreement with counsel for Ford Motor Credit to dismiss the case. **(T. 86, 94)**. The motion for summary judgment in the Auffenberg Ford case was called up for January 13, 2000. **(T. 86)**. Rather than being inconsistent, the summary judgment hearing being miscalendared by his staff further explains how Respondent could, and did, confuse the two cases. Respondent was not dishonest regarding the reason for his failure to appear with the Hodges, the trial court, or anyone else, including Informant.

Informant's brief next addresses the issue of Respondent's brief at the Court of Appeals, although Informant's brief does not clearly state what Rule it is addressing. In the Information Informant alleged Respondent violated Rule 4-1.1 by filing an amended brief which failed to comply with Rule 84.04; since this Court must only consider those charges contained in the Information, it is assumed this is the claim being made in Informant's brief. To determine whether an attorney has the requisite knowledge and skill to handle a particular matter, the Comment to Rule 4-1.1 states that relevant factors include the complexity of the matter, the lawyer's general experience, and the lawyer's experience in the particular field in question. **Inf. App. A-192**. Based on this, Respondent was competent to file the appeal brief and attempted to do so in a manner that would satisfy the Court of Appeals. Although Informant refers to the defects in the brief as substantive they were more of a formatting nature than truly substantive. When his efforts on the appeal brief were to no avail, Respondent suggested that Mrs. Hodge get another attorney to handle the matter. **(T. 52)**. Another factor according to the Comment to Rule 4-1.1 is whether it is feasible to refer the matter to another lawyer. **Inf. App. A-192**. However, rather than do so, Mrs. Hodge got an attorney to sue the

Respondent. (T. 52-53). Her new attorney told Respondent that he would rather sue Respondent than go to the Court of Appeals and get the case straightened out. (T. 59, 95-96). There was nothing more that Respondent could do.

Informant next addresses several alleged violations by Respondent of Rule 4-1.4. However, the Information only alleged that Respondent violated Rule 4-1.4(a) by (i) not informing the Hodges that a summary judgment motion had been filed and (ii) not informing the Hodges that summary judgment had been entered. **Inf. App. A-38-39**. As set forth several times above, this Court must only consider those charges contained in the Information. *In re Westfall*, 808 S.W.2d 829, 832 (Mo. 1991). Regarding these particular allegations, the Respondent did, in fact, inform the Hodges of the motion for summary judgment (**Resp. App. A-11-12; T. 72, 74**), and he first found out about the dismissal of the lawsuit from Mr. Hodge (**T. 73, 94**) so he could not be expected to inform them of the dismissal. The Hodges were fully informed of any information that came into Respondent's possession concerning the case. **Resp. App. A-11-12**. Furthermore, even though this Court must only consider those charges contained in the Information two of the additional violations briefed by Informant will be addressed. Informant's brief states that Respondent never told the Hodges that he filed no response to the motion and did not show up for the hearing; however, as discussed above in detail, Respondent reasonably believed that no response was required (he told the Hodges he didn't think the trial court would grant the motion)(**T. 74**), and had confused the summary judgment hearing with another case he was handling for the Hodges (and upon

learning of the dismissal he told them he had not been at the hearing on the motion)(T. 73-74).

Particularly troubling is Informant's mischaracterization of the statements made by Respondent in his letter to Mrs. Hodge in June 2002. Informant points to the following statements by Respondent in the June letter, claiming that Respondent was referring to the Hodges' car accident lawsuit he handled for them: "I am sorry that you feel that you are somehow entitled to money. You had a claim and it was dismissed. I assume that it was dismissed because it was not worth pursuing." The letter is clear that Respondent was **not** referring to the Hodges' car accident lawsuit he handled for them but, rather, to Mrs. Hodge's claim against Respondent for malpractice. The next sentence of the letter after the portion quoted by Informant states "Please do not blame your other attorneys' actions on me." **Inf. App. A-186**. Even if the letter was not clear on its face that it was referring to the malpractice suit, Respondent's testimony at the hearing made it crystal clear when he testified regarding the letter that "What I was talking to was her malpractice suit." (T. 81). It should also be remembered that at the time of this letter Mrs. Hodge was no longer a client, *i.e.*, no attorney-client relationship existed at the time.

As with the alleged violations of Rule 4-1.4(a), Informant's brief next addresses several alleged violations by Respondent of Rule 4-8.4(c), some of which were not contained in the Information and which must therefore not be considered. The Information alleged only that Respondent violated Rule 4-8.4(c) by (i) misrepresenting the reason he failed to appear for the hearing on the motion for summary judgment and (ii) gave an incorrect reason to Mrs. Hodge for why summary judgment had been entered.

Inf. App. A-39. As discussed in detail above, Respondent had confused the case with another case in which he represented the Hodges which involved Ford Motor Credit; when he learned from Mr. Hodge of the dismissal of the car accident lawsuit he filed a motion to set aside the summary judgment. **(T. 93-94).** Respondent made no misrepresentations to the Hodges or Informant and at no time attempted to mislead anyone. **(T. 95, 104).**

Finally, with regard to Rule 4-1.5(c), although Respondent had a contingent fee arrangement with the Hodges which was not in writing, Informant has presented no evidence that there was ever any issue regarding the fee or the fee arrangement. No harm or injury was caused to anyone by virtue of the fee arrangement. Informant has certainly not proven such by a preponderance of the evidence. As reflected in the Preamble to the ABA Model Rules, the Rules presuppose that whether or not discipline should be imposed for a violation depends on the circumstances. ABA/BNA Lawyers' Manual on Professional Conduct pp. 01:103 - 01:104. Therefore, even though there may have been a technical violation of Rule 4-1.5(c), Respondent submits that no discipline should be imposed under these circumstances.

ARGUMENT

II.

ASSUMING THAT THE SUPREME COURT DETERMINES THAT IT SHOULD IMPOSE SOME DEGREE OF DISCIPLINE ON RESPONDENT THE COURT SHOULD NOT IMPOSE ANY DISCIPLINE MORE SEVERE THAN A REPRIMAND AGAINST RESPONDENT BECAUSE THE RELEVANT STANDARDS, PRIOR CASES OF THIS COURT, AND THE MITIGATING FACTORS PRESENT INDICATE THAT THE MOST SEVERE DISCIPLINE WHICH COULD BE WARRANTED UNDER THE EVIDENCE IS A REPRIMAND IN THAT, AT MOST, ALL INFORMANT HAS PROVEN IS AN ACCIDENTAL, UNINTENTIONAL VIOLATION DUE TO A MISTAKE ON THE PART OF RESPONDENT.

[RESPONDS TO INFORMANT’S POINT II]

Applicable Standard: In disciplinary proceedings, this Court reviews the evidence de novo and independently determines all issues pertaining to credibility of witnesses and the weight of the evidence, and draws its own conclusions of law; the decision of the disciplinary hearing panel is purely advisory. *In re Shelhorse*, 147 S.W.3d 79, 80 (Mo. 2004). “Professional misconduct must be proven by a preponderance of the evidence before discipline will be imposed.” *Id.*

This Point of Respondent's brief proceeds under the assumption for purposes of argument that Informant has proven by a preponderance of the evidence that Respondent has violated some Rule he was charged in the Information with violating (other than a technical violation of Rule 4-1.5(c), which caused no harm or injury), and the assumption that this Court has determined that some degree of discipline should be imposed (although the Court should not consider this to constitute Respondent's belief in such assumptions). Even if it is assumed for purposes of argument that Informant has proven by a preponderance of the evidence that Respondent has violated some Rule he was charged in the Information with violating (other than a technical violation of Rule 4-1.5(c), which caused no harm or injury), and assuming that this Court has determined that some degree of discipline should be imposed, Informant has clearly not proven that any discipline more severe than reprimand is warranted or appropriate under the circumstances.

Informant has not proven that Respondent committed any Rule violation intentionally, willfully, knowingly, or deceitfully (**T. 95, 104**), or with the intent to benefit the Respondent or another. Informant has not proven any pattern of violation or course of conduct proving that Respondent does not understand fundamental legal doctrines. Finally, Informant has not proven what degree of harm, if any, the Hodges suffered by reason of any action of Respondent, claiming only that the Hodges lost the opportunity the legal system affords for an assessment of their claim. In this regard it must be remembered that there is no guarantee that the Hodges would have won their lawsuit even if it had gone to trial, and that when Respondent suggested to Mrs. Hodge

that she get another attorney to pursue the appeal that attorney chose instead to sue Respondent rather than attempt to straighten out the appeal. (T. 52-53, 59, 95-96). At most, all Informant has proven is an accidental, unintentional violation due to a good faith mistake on the part of Respondent. In recognition of this, the most nearly applicable ABA Standards for Imposing Lawyer Sanctions would call for either an admonition (Standards 4.44 or 4.54 depending upon the Rule found to be violated) or, at most, a reprimand (Standards 4.43 or 4.53 depending upon the Rule found to be violated). *See*, ABA Standards for Imposing Lawyer Sanctions, as set forth in the ABA/BNA Lawyers' Manual on Professional Conduct pp. 01:823 - 01:825.

The two cases cited by Informant under this point of Informant's brief do not support Informant's argument, as they are clearly distinct from the present case. The case of *In re Murphy*, 732 S.W.2d 895 (Mo. 1987) cited by Informant involved failing to file a case, failing to deposit assets in an interest bearing account, and lying to the client and court and involved at least three different cases or matters handled by the attorney. *In re Frick*, 694 S.W.2d 473 (Mo. 1985), also cited by Informant, is even less applicable as it involved an attorney harassing a former client with whom he had an affair and five acts of violence and vandalism by the attorney against the former client.

Informant's brief states that Respondent's Rule 4-8.4(c) violations are the most serious. As set forth under Point I above, Respondent vehemently disputes that any violation of Rule 4-8.4(c) was committed, and the evidence demonstrates that no such violation occurred; Informant certainly did not prove that such a violation occurred. However, since Informant referred to violations of Rule 4-8.4(c) as the most serious and

warranting disbarment, the Court should be aware that in the case of *In re Cupples*, 952 S.W.2d 226 (Mo. 1997) the Court held that the attorney in that case, who was found to have committed two violations of Rule 4-8.4(c), should be reprimanded, not disbarred or even suspended.

Examination of other prior cases also reveals the extreme and inappropriate nature of Informant's request that Respondent be disbarred. "Disbarment is the ultimate sanction of the court. [citation omitted] For disbarment to be appropriate, it must be demonstrably clear that the attorney is not fit to continue in this profession." *In re Staab*, 719 S.W.2d 780, 784 (Mo. 1986). In that case, the attorney was found guilty of two counts of neglect and engaging in conduct prejudicial to the administration of justice which adversely reflected on his fitness to practice law. *Id.* In one of the neglect violations, his client's case had been dismissed after he failed to answer a show cause order which had been issued because of his failure to timely file a brief; after the case had been dismissed, the attorney spoke with the client approximately 75 times without informing the client of the dismissal and even assured the client that the case was still pending. *Id.* at 782-783. In the other neglect violation, he was retained in 1977 to handle a workers' compensation matter; he later became convinced the case lacked merit but did not so inform the client, and, in fact, the client was produced for a deposition in 1981; in 1982 he asked that the file be held while he consulted the client about a voluntary dismissal but failed to consult the client and the case was dismissed; thereafter he represented to the client that the case was still pending, and even asked the client for a medical authorization in 1984. *Id.* at 782. The Court found there was no irreparable

harm to the clients. As reflected by the foregoing, Mr. Staab's conduct was far more egregious than the allegations against Respondent in the present case. After considering some mitigating factors, the Court ordered a reprimand in the *Staab* case. *Id.* at 784-785.

Likewise, in *In re Hardge*, 713 S.W.2d 503 (Mo. 1986), which involved competency and neglect violations and a failure to timely pursue the client's interests, the Court imposed a reprimand. A reprimand was even deemed appropriate for a felony conviction in *In re McBride*, 938 S.W.2d 905 (Mo. 1997).

Even in cases involving conduct which was much more nefarious than anything Informant alleges against Respondent the Court has not seen fit to impose the ultimate sanction of disbarment as requested by Informant. In *In re Charron*, 918 S.W.2d 257 (Mo. 1996) the respondent attorney was found to have violated Rules 4-1.1, 4-1.3, 4-1.5, 4-1.7(b), 4-1.15(b), and 4-3.4(c), including, among other violations, **misappropriating \$20,000** from a probate estate. Although the Court stated that misappropriation of funds generally warrants disbarment, the attorney was only suspended. *Id.* at 262. And in *In re Howard*, 912 S.W.2d 61 (Mo. 1995), which involved multiple instances of sexual misconduct (according to the Court, the attorney "attempted to force clients to prostitute themselves to secure legal services" *Id.* at 62) and also involved maligning the judiciary, the Court did not disbar the respondent attorney but suspended him. *Id.* at 64. Informant's request in the instant case that Respondent be disbarred is clearly unwarranted. Respondent's alleged violations do not even warrant suspension.

Informant's brief refers to Respondent's one previous reprimand as an aggravating factor and alleges that it involved Respondent's failure to do certain things stated in

Informant's brief. However, a review of the Order itself in that case reveals that it only found him to have violated Rule 4-1.3, rather than stating what specific act or acts it found to have constituted the violation. **Inf. App. A-52.**

Although Informant discusses what Informant believes to be aggravating factors, Informant fails to mention any mitigating factors, should the Court determine that discipline should be imposed. Mitigating factors supported by the evidence in this case include, at a minimum, delay in the disciplinary proceedings and absence of a dishonest or selfish motive. ABA Standards for Imposing Lawyer Sanctions, Standard 9.32. According to Informant's brief, the Hodges' appeal was dismissed by order dated September 28, 2000; Mrs. Hodge filed her complaint with Informant on April 20, 2001; Informant did not file the Information against Respondent until June 2003; and the disciplinary hearing was held in March 2004. It is now 2005. This delay in disciplinary proceedings should serve as a mitigating factor. Also, as discussed above, at most all Informant has proven is an accidental, unintentional violation due to a good faith mistake on the part of Respondent and certainly no dishonest or selfish motive on the part of Respondent. This too should serve as a mitigating factor.

The burden of proof is on the Informant. The relevant standards, prior cases from this Court, and mitigating factors demonstrate that based on the evidence in this case, even if it is assumed for purposes of argument that Informant has proven by a preponderance of the evidence that Respondent has violated some Rule he was charged in the Information with violating (other than a technical violation of Rule 4-1.5(c), which caused no harm or injury), and assuming that this Court has determined that some degree

of discipline should be imposed, the most severe discipline which could be warranted under the evidence is a reprimand.

CONCLUSION

Informant has not proven by a preponderance of the evidence that Respondent violated Rules 4-1.1, 4-1.3, 4-1.4(a) or 4-8.4(c), or that any violation of Rule 4-1.5(c) which may have occurred caused any harm or injury. Accordingly, the Court should not discipline Respondent. However, even assuming for purposes of argument that Informant has proven by a preponderance of the evidence that Respondent has violated some Rule he was charged in the Information with violating (other than a technical violation of Rule 4-1.5(c), which caused no harm or injury), and assuming that this Court has determined that some degree of discipline should be imposed, Informant has clearly not proven that any discipline more severe than a reprimand is warranted or appropriate under the circumstances.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of February, 2005, two copies of Respondent's

Brief have been sent via First Class mail to:

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Attorney for Informant

Jeffrey A. Keevil

CERTIFICATION: RULE 84.06(c)

I certify to the best of my knowledge, information and belief, that this brief:

1. Includes the information required by Rule 55.03;
2. Complies with the limitations contained in Rule 84.06(b);
3. Contains 6,992 words, according to Microsoft Word, which is the word processing system used to prepare this brief; and
4. That Norton Anti-Virus software was used to scan the disk for viruses and that it is virus free.

Jeffrey A. Keevil

APPENDIX